

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of Inovalon, Inc.’s)	
Petition for Expedited Declaratory Ruling)	
)	CG Docket No. 02-278
)	
Rules and Regulations Implementing the)	
Telephone Consumer Protection Act of 1991)	

REPLY COMMENTS OF INOVALON, INC.

Inovalon, Inc. (“Inovalon”) by its counsel, submits these reply comments in support of its Petition for Expedited Declaratory Ruling Clarifying the Unsolicited Advertisement Provision of Telephone Consumer Protection Act and Junk Fax Prevention Act (hereinafter, the “Petition”). The issue presented by Inovalon’s Petition is narrow but fundamental: Inovalon has not asked the Commission to decide the lawsuit from which this Petition arises or to address the Fourth Circuit’s recent pronouncement on the deference due to FCC interpretations;¹ rather, it simply asks the Commission to exercise its “sound discretion . . . to terminate a controversy [and] remove uncertainty”² plaguing the courts and the health care industry regarding the interpretation of an “advertisement” for purposes of the Commission’s fax rules promulgated under Telephone Consumer Protection Act (“TCPA”), as amended in 2006 by the Junk Fax Prevention Act (“JFPA”).

While the Commission’s policies and rules under the JFPA are, as Inovalon has shown in its Petition and supporting comments, susceptible to varying interpretations, there is no ambiguity in Inovalon’s position: faxes with no direct commercial purpose, and offering no commercially available products or services to the recipients, are not “advertisements.” Inovalon maintains that

¹ *Carlton & Harris Chiropractic, Inc. v. PDR Network, LLC*, 883 F.3d 459 (4th Cir. 2018).

² 5 U.S.C. § 554(e).

its position is abundantly supported by the Commission’s policies as articulated in the April 6, 2006 Report and Order and Third Order on Reconsideration (“2006 Order”)³ and with the policies that led Congress to adopt the JFPA from which the Commission’s policies derive. The lone dissenting comments came from Eric B. Fromer Chiropractic, Inc. (“Fromer”), a health care provider who seems interested in becoming a professional TCPA plaintiff and currently is suing Inovalon. Fromer’s reasons for opposing the Petition are obvious, but they should not dissuade the Commission from stepping in to resolve uncertainty, to bring stability to a health care industry that relies heavily on fax communications, and to curb the tide of abusive TCPA litigation.

In its comments, Fromer argues that there is no controversy or uncertainty for the Commission to resolve because its 2006 Order – issued more than a decade ago when fax advertising to traditional fax machines was prevalent – conclusively established that all fax messages promoting no cost goods or services are unsolicited advertisements under the TCPA’s definition.⁴ Nothing could be further from the truth. The sheer volume of court decisions wrestling with the question of when a fax promoting free goods or services becomes an advertisement belies any notion that no controversy exists.⁵ There is even less clarity as to when a fax, which is a part of a transaction voluntarily entered into by the recipient is an “advertisement.” Fromer’s own articulation of the purportedly clear rule conflates advertisements with *unsolicited* advertisements and elides, if it does not eviscerate, the “transactional” exception to the definition of advertisement.⁶ Thus, the crux of the issue presented by this Petition is that the 2006 Order comes

³ *In re Rules & Regulations Implementing the Tel. Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005*, Report & Order & Third Order on Reconsideration, 21 FCC Rcd. 3787 (April 6, 2006).

⁴ Eric B. Fromer Chiropractic, Inc.’s Comments on Pet. for Expedited Decl. Ruling of Inovalon, Inc., at 1-2 (Mar. 26, 2018) (hereinafter “Fromer Comments”).

⁵ See Petition at 9-10 (collecting cases).

⁶ Fromer Comments, at 2 (selectively quoting from the 2006 Order that “facsimile messages that promote goods or services even at no cost, such as free magazine subscriptions, catalogs, or free consultations or seminars, are

close but does not fully define the term “advertisement” for the specific purposes of the JFPA; nor does it articulate a clear explanation of why some messages promoting free goods and services are considered advertisements and others are not.

Contrary to Fromer’s assertion, the 2006 Order did not state that “faxes offering free goods or services ‘are’ advertisements,” full stop.⁷ If it had, then the Commission’s discussion of “transactional” communications and “informational” messages would have been entirely moot.⁸ The paragraphs dedicated to “transactional” and “informational” faxes are necessary *precisely because* those messages otherwise would have been swept up in a one-size-fits-all approach to any fax that contains information about free goods or services. It simply cannot be the case that *all* fax messages mentioning no cost goods or services are advertisements, let alone unsolicited advertisements.

Yet that is the very essence of Fromer’s Comments. Indeed, Fromer does not attempt to justify its claim that there is no controversy about faxes of the type involved here by reference to the language of the Rule or the Commission’s discussion of it. Rather, the entirety of its argument – except for a defense of the Fourth Circuit’s decision, which, of course, is not before this Commission – is an assertion that Inovalon has misread and over-stressed the Commission’s articulation of the “primary purpose” test. Fromer claims that Inovalon’s reading of the 2006 Order “skip[s]” a “multi-factor test,” which Fromer asserts inheres in the 2006 Order, but which Fromer fails or is unable to explain.

unsolicited advertisements under the TCPA’s definition.”). Surely Fromer must have meant to argue that such messages are merely “advertisements,” because the exact same message – a fax promoting no cost goods or services – sent at a recipient’s invitation could not possibly be considered an “unsolicited advertisement,” even if it were *arguendo* an “advertisement.” *See also* 2006 Order, ¶¶ 49-51.

⁷ Fromer Comments, at 2.

⁸ 2006 Order, ¶¶ 49-51, 53.

If such a “multi-factor test” exists, it is known only to Fromer. It has not been defined by the Commission or, for that matter, by the courts; there is no Commission Order or judicial decision purporting to apply that alleged new standard to a fact pattern such as that presented here. In short, there is nothing in current law or policy pursuant to which messages whose primary purpose is to provide information that enables the recipient to carry out a pre-existing transactional obligation are to be treated as advertisements.

Multi-factor test or not, the “primary purpose” of a fax message is of paramount importance to the classification of faxes. The Commission’s treatment of transactional, informational, and non-transactional *or* informational messages reveals that the Commission’s lode star – drawn straight from the statutory definition⁹ – is whether the message is “*advertis[ing] the commercial availability or quality*” of a good or service to the recipient.¹⁰ A message “whose purpose is to facilitate, complete, or confirm a commercial transaction that the recipient has previously agreed to enter into with the sender [is] not [an] advertisement[] for purposes of the TCPA’s facsimile advertising rules.”¹¹ It is noteworthy that the primary purpose test is not narrowly defined; it includes faxes whose purpose are to “facilitate” a commercial transaction into which recipient previously has entered even if that act of facilitation involves the offer of a service or product. A message containing “only information” is not an advertisement subject to the JFPA.¹² And a message that contains an incidental advertisement but whose primary purpose is to facilitate an

⁹ 47 U.S.C. § 227(a)(5) (“The term ‘unsolicited advertisement’ means any material advertising the *commercial availability* or quality of any property, goods, or services which is transmitted to any person without that person’s prior express invitation or permission, in writing or otherwise.”) (emphasis added).

¹⁰ 2006 Order, ¶ 50 (emphasis added) (internal quotation omitted).

¹¹ *Id.* ¶ 49.

¹² *Id.* ¶ 53.

underlying and pre-existing transaction has not heretofore been classified subject the JFPA. It is exactly that proposition that Inovalon's Petition seeks to confirm.

To be sure, there are limits to the transactional/informational exception. The Commission's policy statement makes clear that free-to-pay offers are not "free" in the sense that Congress intended some messages to be exempt from the JFPA. As a result, the Commission explained that a message that "serve[s] as a mere pretext to an advertisement" is an unsolicited advertisement (assuming it is unsolicited).¹³ The question of whether a message is a pretext cannot be answered without examining the primary purpose of the message. There is absolutely nothing in the type of faxes at issue here upon which to base a claim that the message is a pretext for selling a product to Fromer or the other health care providers that Inovalon contacts on behalf of the health plans for whom it works. Fromer's rote recitation of Paragraph 52 of the 2006 Order cannot overcome that simple fact.

Nor should the Commission ignore the reasons that Congress enacted the JFPA in the first place more than a decade ago. Prior to its enactment, faxes were treated in the same way as telephone calls subject to the TCPA. Congress enacted the JFPA because it became convinced that fax communications materially differ from telephone communications, both in terms of the users and the intended recipients. The telephone is used primarily for offers and transactions with consumers; these are business-to-consumer (B2C) calls. Faxes, by contrast, were and continue to be used for business-to-business (B2B) communications, reaching a different audience and doing so in a way which Congress and the Commission perceive to be less intrusive on privacy concerns than is the case with calls to consumers.¹⁴ The JFPA amended the TCPA to permit greater

¹³ *Id.* ¶ 54.

¹⁴ *Id.* ¶ 11 (expressly recognizing an established business relationship exemption from the prohibition on sending unsolicited fax advertisements: the "legislation is designed to permit legitimate businesses to do business with their established customers and other persons with whom they have an established business relationship without the

flexibility in the use of fax as a medium in order to avoid unduly intruding upon the efficient and cost-effective operation of the economy. The Commission's task under the JFPA is to balance the competing interests at stake. That balance simply is not achievable by a one-size-fits-all policy, and that is especially true when it comes to matters relating to health care and the economics of the health care industries involved here.

Although the primary commercial purpose lode star emerges from a reading of the 2006 Order, there are enough TCPA litigants who have managed to muddy the waters and sow confusion in the courts that the time has come for the Commission to step in and clarify matters. Accordingly, for the reasons set forth in Inovalon's Petition, and as explicated in this Reply and the comments of other parties supporting the Petition, Inovalon maintains its request that the Commission declare that:

1. Where an established business relationship exists between a health insurance plan and a medical provider, and the provider has given its facsimile number to the health plan, faxes sent by the health plan's designee to the provider seeking to collect patient health records are not "advertisements" under the TCPA; and
2. Faxes that offer free or "no cost" electronic health record collection, and which do not offer any commercially available product or service to the recipients, are not "advertisements" under the TCPA.

April 10, 2018

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burden of collecting prior written permission to send these recipients commercial faxes") (citing S. Rep. No. 109-76, at 8).